BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF COURTS BELOW

Eldredge v. Rothensies (1944), 57 F. Supp. 474 (R. 17-19).

Eldredge v. Rothensies (CCA 3—1945), 150 F. 2d 23 (R. 22-26).

II. JURISDICTION

Stated under heading II in the petition, and said statement, in the interest of brevity, is adopted and made part of this brief.

III. STATEMENT OF THE CASE

Stated under heading I in the petition, and said statement, in the interest of brevity, is adopted and made part of this brief.

IV. SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Third Circuit erred in affirming the judgment of the United States District Court for the Eastern District of Pennsylvania.

2. Said Circuit Court of Appeals erred in holding that this case is ruled by the decision of this Court in **Fidelity-Phila. Trust Co. v. Rothensies,** 324 U.S. 108.

3. Said Court erred in not applying to this case the rule announced by this Court in **May v. Heiner,** 281 U.S. 238.

4. Said Court erred in holding that the property transferred by decedent by deed dated February 19, 1930, is taxable as a part of decedent's estate under Section 302(c) of the Revenue Act of 1926.

V. ARGUMENT

SUMMARY

Point A. The question whether an inter vivos trust is subject to Federal Estate Tax under Section 302(c) of the Revenue Act of 1926 on the present facts is an important question of Federal Estate Tax law which has not yet been settled by this Court; and the decisions of this Court relied on by the Circuit Court of Appeals are clearly distinguishable on their facts from the present case.

Point B. The decision of the Circuit Court of Appeals for the Third Circuit in this case is inconsistent with a recent decision of the Circuit Court of Appeals for the Second Circuit and is in conflict with recent decisions of the Tax Court construing Section 811(c) of the Internal Revenue Code and the decision of this Court in **Fidelity-Phila. Trust Co. v. Rothensies** (1945), 324 U.S 108.

Point A

The Question Whether an Inter Vivos Trust Is Subject to Federal Estate Tax Under Section 302(c) of the Revenue Act of 1926 on the Present Facts Is an Important Question of Federal Estate Tax Law Which Has Not Yet Been Settled by This Court; and the Decisions of This Court Relied on by the Circuit Court of Appeals Are Clearly Distinguishable on Their Facts from the Present Case.

Section 302(c) of the Revenue Act of February 26, 1926, 44 Stat. 70, brings within a decedent's gross estate for Federal Estate Tax purposes property transferred "by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death. . . ."

The facts in this case, as stated in the foregoing petition, differ in important particulars from those in cases

previously passed upon by this Court construing this statute. In **Fidelity-Phila. Trust Co. v. Rothensies** (1945), 324 U.S. 108, the trust provided for income to Mrs. Stinson (the settlor) for her life, then to A and B (her unmarried minor daughters) for life, with remainders at the death of A and B to the surviving descendants of each per stirpes, with cross gifts if either died without descendants; if both died without descendants the corpus was to be paid to such persons as settlor should appoint by will.

In the present case, the Circuit Court of Appeals said that this Court held in the cited case that the reserved power of appointment was a "vital factor" (R. 24). But it was *the facts to which this language of the trust deed applied* which was the vital factor. Those facts were that the settlor, as pointed out by Judge Biggs in his opinion in the Circuit Court of Appeals in that case, "put the remainders in the grantor's grandchildren who were not in esse at the time the indenture was executed": **Fidelity-Phila. Trust Co. v. Rothensies** (CCA 3—1944), 142 F.(2d) 838, 840.

In his concurring opinion, Judge Jones also emphasized that this was the vital factor: 142 F.(2d) 841.

The day the Stinson trust was drawn it was clear that the remainders would pass under settlor's will unless her small daughters grew up, married, had children and they outlived both settlor and her daughters. Whether this would occur could not be determined until at or after settlor's death. Because of these facts (rather than the fact a power of appointment would operate on the remainders if they stayed within the settlor's control) the Circuit Court of Appeals considered that the settlor "selected to hold in suspense the ultimate disposition of the property until the moment of death": 142 F.(2d) 838, 840.

When Mrs. Stinson died she still had no grandchildren *and if her two daughters had died the following day the remainders would have passed under Mrs. Stinson's will* rather than under the deed of trust.

We submit that when this Court affirmed the judgment in the Stinson Estate case it was this factual picture, rather

than the mere existence of a power of appointment in the deed of trust, which was considered to be "a vital factor". This seems clear from what was said by this Court on June 11, 1945, in **Goldstone v. United States,** 325 U.S ——, 65 S. Ct. 1323. In the case at bar the Circuit Court of Appeals filed its printed opinion on June 12, 1945, and it is obvious that when it prepared the opinion it did not have the benefit of this Court's later explanation of the scope of the decision in the Stinson Estate case. (The case was called to the attention of the Circuit Court of Appeals in the petition for rehearing.)

In **Goldstone v. United States,** supra, Mr. Justice Murphy, in explaining his opinion in the Stinson Estate case said:

> "The disappearance of a decedent's reversionary interest, together with the resulting estate tax liability, prior to death through events beyond the decedent's control *is a possibility in many situations such as the one in issue.*[3] " (Italics added.)

If we correctly understand this language it means that an examination of the facts in the particular case may lead to a finding of fact by the Court that there has been a "disappearance of a decedent's reversionary interest" prior to the death of the decedent, together with "the disappearance of" the "resulting estate tax liability."

Mr. Justice Murphy explained this sentence by saying in the footnote 3, appended to it:

> "Thus, in Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U. S. 108, the decedent's contingent power of appointment was exercisable only if her two daughters died before her and left no surviving descendants. *If* the daughters died first but left surviving descendants, *it would be certain before the decedent's death that her power of appointment would be nugatory.* But such a contingency did not happen. *At the time when the decedent died there was still the possibility that her power of appointment might be effective.* . . ." (Italics added.)

We understand this to mean that, despite the reserved power of appointment, if at the time of settlor's death there had been in existence "surviving descendants" to take the remainder the power of appointment "would (have been) nugatory" and the trust not taxable. But because such class was still not "in esse" upon settlor's death "there was still the possibility that her power of appointment might be effective."

No such possibility existed in the case at bar. At the time Mrs. Taylor died her three children who owned the entire remainder were there to take it—and did take it. At the moment of her death she did not have possession of that power of appointment. By reason of the existence of her three children at the time the trust was created and at the time of her death it was "certain" that "her power of appointment would be nugatory."

Mr. Justice Murphy also said:

> "But the imposition and computation of the estate tax are based upon the *interests in actual existence* at the time of the decedent's *death.* It follows that only those events *that actually occurred prior to that moment* can be considered in determining the existence and value of the taxable interests. Events that might have *but failed to take place* so as to erase a decedent's reversionary interest must be ignored; such *unrealized possibilities,* if significant at all, only add to the remoteness of the reversionary interest." (Italics added.)

In the present case at the moment of Mrs. Taylor's death she had no "interests in actual existence" in the remainder because the "actual existence" of her three living children put the remainder in them and made the power of appointment "nugatory". The word "nugatory" means "of no force; inoperative; ineffectual; invalid; futile": Webster's New International Dictionary.

In the Stinson case "events that might have but failed to take place" before settlor's death did not free the trust from tax. In the case at bar "those events that actually occurred prior to that moment" should free the Taylor Estate from the tax erroneously assessed against it.

The second case in this Court relied on by the Circuit Court of Appeals is **Commissioner v. Estate of Field** (1945), 324 U.S. 113 (R. 24-25). It is clearly not in point on its facts. "The grantor retained the right to reduce or cancel by will or written instrument the interests of the children; and the corpus would have been returned to the grantor if he survived his nieces": 324 U.S. 113, 117, per Mr. Justice Douglas.

It may be argued that because Mrs. Means' (Taylor's) issue had to survive her their interests were conditioned on her death and hence were testamentary. However, if another life tenant were substituted for Mrs. Means (Taylor) the interests of her issue would be conditioned on other than survivorship of her. The quality of the gift to her issue and the nature of their remainder is not affected by the identity of the life tenant. And a transfer otherwise unobjectionable is not brought within Section 302(c) (when made prior to March 3, 1931) because the settlor puts the life estate in herself rather than in somebody else. Such is the holding in **May v. Heiner** (1930) 281 U.S. 238, 50 S. Ct. 286. In that case the transfer was to W for life, then to G (settlor) for life, then the remainder to G's four children, their appointees, or heirs. In holding the transfer not taxable the Court said that the transfer "was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed": 282 U.S. 243. Yet, if Mrs. May's four children had predeceased her without issue and without exercising their power of appointment, the remainder would have reverted to Mrs.

May. There was an actual possibility the remainder would revert to her and pass under her will or the intestate law.

In **May v. Heiner** the Court relied upon **Reinecke v. Northern Trust Co.** (1929), 278 U.S. 339, 49 S. Ct. 123. There the transfer was to A for life with vested remainders over to take effect at A's death or five years after G's (grantor's) death, whichever was later. The Court held that the mere passing of possession and enjoyment from the life tenant to the remainderman at or after the date of G's death did not subject the transfer to tax under section 302(c). From this case it seems that "at or after death" means not only that the interests take effect at the time of G's death but also that they take effect *because* of his death. To make the section applicable G's death must determine not only when but also to whom the property will pass.

The year after **May v. Heiner** was decided it was followed in **Morsman v. Burnet** (1931), 283 U.S. 783, 51 S. Ct. 343, and in **McCormick v. Burnet** (1931), 283 U.S. 784, 51 S. Ct. 343. In the **Morsman** case the transfer held not taxable, was to G for life, then income for two years to his four sons, then corpus to his then surviving sons, and the issue of any deceased son. In that case if there had been no sons or issue two years after G's death the remainders would have failed and the property would have reverted to G and passed under the provisions of his will. Yet, this actual possibility of reverter was ignored by the Court.

In the **Burnet** case the transfer held not taxable, was to G (or one designated by her) for life, then for life to G's three children, with provision the trust should end upon the death of the survivor of the children and a further provision that the principal should be repaid to the settlor "if she shall then be living".

Six weeks after the last two cases were decided the Court decided **Klein v. United States** (1931), 283 U.S. 231, 51 S. Ct. 398. The case involved a transfer of land by deed, to grantor's wife, and not an inter vivos trust. The habendum clause of the deed provided "To have and to hold the said lands unto the said grantee for and during the term of

her natural life" and that if the grantee survived the grantor "then and in that case only the said grantee shall . . . hold the said lands in fee simple". Otherwise the fee minus the life estate was expressly "reserved to said grantor and exempted from this conveyance". The Court held that the value of the land after deducting the life estate was taxable to the grantor's estate, he having predeceased his wife. The Court pointed out that "The two clauses of the deed are quite distinct—the first conveys a life estate; the second deals with the remainder". The Court said at page 234:

> "Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event *which brought the larger estate into being* for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed." (Italics added.)

It is clear that this decision is in no way inconsistent with **May v. Heiner.** It is the unanimous decision of the same Court which had just unanimously reaffirmed **May v. Heiner** in a group of three cases.

The next important case is **Helvering v. Hallock** (1940), 309 U.S. 106, 60 S. Ct. 444. The facts are simple. A group of inter vivos trusts were involved. In the **Hallock** trust G, pursuant to a separation agreement, gave W the income for life and provided that upon her death the trust should end and the principal be returned to G, if then living, otherwise to G's named children. In the **Huston** trust G gave W a life estate, with remainder in G, if he survived her, otherwise remainder to W at his death. In the **Bryant** trust G gave a life estate to W, then a life estate to G, and remainder to G's estate.

It is to be noted that in the **Bryant** trust nothing but a life estate was transferred and G always had a true reversion which was part of his estate at his death and tax-

able under Clause (a) of Section 302, regardless of Clause (c); and in the other cases life estates were transferred with the remainder in G if then living. The similarity to **Klein v. U.S.** is apparent (except that the **Bryant** case was even stronger for the Government and all the Courts through which it passed agreed that the reversion was taxable). And it was to the **Klein** case that the Court turned as furnishing "a harmonizing principle" in construing Section 302(c). Mr. Justice Frankfurter in his opinion did not purport to make new law. He purported to free the rule of the **Klein** case from the limitations imposed upon it by the **St. Louis Trust Co.** cases. He quoted with approval the language in the Klein case already quoted in this brief and Mr. Justice Stone's dissenting opinion in the **St. Louis Trust Co** cases. In discussing the **Klein** case he said "By bringing into the gross estate at his death that *which the settlor gave contingently upon it*, this Court fastened on the vital factor": 309 U.S. 112. (Italics added.)

In considering what Mr. Justice Frankfurter meant by this language we must consider the facts of the cases then before the Court and the facts in "the three recent decisions" of the Supreme Court which he was analyzing. In the **St. Louis Trust Co.** cases, which were overruled, a father transferred a life estate to his daughter with remainder in himself if living. In his dissenting opinion in those cases Mr. Justice Stone said: "It seems plain that the gift here was not complete until decedent's death. He did not desire to make a complete gift. He wished to keep the property for himself in case he survived his daughter": 296 U.S. 39, 47.

So in all of the transfers involved in **Helvering v. Hallock,** in the **Klein** case, and in the **St. Louis Trust Co.** cases we find a gift of life estates only which could (in five of the six transfers) become more if the grantor predeceased the grantee. *But in the case at bar the settlor made a complete present gift* and reserved for herself only the life estate, which is permissible under **May v. Heiner.** She didn't keep any "string" attached to the property. In de-

termining what is meant by this word the setting in which it first appears is of importance. It was first used by Mr. Justice Stone in his dissenting opinion in **Helvering v. St. Louis Union Trust Co.** (1935), 296 U.S. 39, 56 S. Ct. 74. After pointing out that the father "did not desire to make a complete gift" and "wished to keep the property for himself in case he survived his daughter" and "He kept this hold upon it by reserving from his gift an interest, terminable only at his death, by which full ownership would be restored to him if he survived his daughter" Mr. Justice Stone went on to say:

> "Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device — *what particular string*—the decedent selected *to hold in suspense* the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form": 296 U.S. 47. (Italics added.)

When Mr. Justice Frankfurter quoted this language with approval in **Helvering v. Hallock** he was applying it to the very same type of transfer which Mr. Justice Stone had before him, i. e., the gift of a life estate, with remainder in G unless he predeceased the life tenant. Consequently what is meant by a "string" was in no sense extended or broadened in **Helvering v. Hallock.**

But in the case at bar the settlor did not "hold in suspense" the remainder until her death and thereby attach a string to it. She made an absolute, unqualified gift of the remainder to her children and to issue of deceased children, just as was done in **May v. Heiner.** The language in it applies exactly: "At the death of Mrs. May (here Mrs. Constance Gardner Means Taylor) no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed": 281 U.S. 243. Specifically saying in the deed in the case at

bar what would happen in the remote event of the extinction of all lineal descendants of the settlor (and thus here spelling out what the law would have said in the same situation in **May v. Heiner**) did not "hold in suspense" the gift to the children and their issue.

The foregoing reviews all of the cases in this Court which deal with the general problem, and in each case in which a tax was upheld the facts were significantly different from those now presented to the Court. On its material facts the case is closer to **May v. Heiner** than to any other case. If in drafting the sentence of the deed of trust which appears on p. 3 of the petition for a writ of certiorari the draftsman had stopped at the semicolon the case would be identical with **May v. Heiner** on its material facts. This Court held that on such facts the transfer by deed of trust was not taxable under Section 402(c) of the Revenue Act of 1918 which was the predecessor of Section 302(c) of the Revenue Act of 1926 (now Section 811(c) of the Internal Revenue Code).

The language added after the semicolon takes nothing away from the remaindermen. It reflects a cautious draftsman's attempt to cover all possible contingencies. On the facts of the case at bar this added language was inoperative, ineffectual and futile; in short, it was "nugatory". That being so, the language after the semicolon is of no legal importance. The case is then ruled by **May v. Heiner** and the Circuit Court of Appeals erred in not applying that case and in holding that the existence of a "nugatory" power of appointment brought the case within the rule of **Fidelity-Phila. Trust Co. v. Rothensies,** supra, in which the power of appointment was *not* nugatory.

We submit that this is an important question of Federal Estate Tax law which should be definitely settled by this Court in order to eliminate the confusion and uncertainty which presently exists in the lower Federal courts and in the minds of the Bar.

Point B

The Decision of the Circuit Court of Appeals for the Third Circuit in This Case Is Inconsistent With a Recent Decision of the Circuit Court of Appeals for the Second Circuit and Is in Conflict With Recent Decisions of the Tax Court Construing Section 811(c) of the Internal Revenue Code and the Decision of This Court in Fidelity-Phila. Trust Co. v. Rothensies (1945), 324 U.S. 108.

Section 302(c) of the Act of February 26, 1926, 44 Stat. 70 (now Internal Revenue Code, Section 811(c)), applies to a transfer "intended to take effect in possession or enjoyment at or after his death". It was the intent of Congress to make the *intent* of the decedent controlling. In determining the decedent's intent (which is a fact to be derived from the circumstances in which she spoke as well as from what she said) it is important to consider that this trust was drawn pursuant to an agreement to make immediate and irrevocable provision for settlor's then living children. Mr. Means was not willing to have this postponed until Mrs. Means' death (R. 15). The price she paid for an uncontested divorce was to make a complete transfer of certain property for her children, reserving to herself the income for life. There was no string attached to it. "Upon my death they shall divide the said fund into as many equal parts as there shall be children of mine then living and issue of any child of mine who shall have deceased leaving issue then living, the issue of each deceased child counting as one, and pay over" the principal to them (R. 11).

But the Circuit Court of Appeals took the view that the possibility that settlor's entire living line might have (but did not) die out before her death was sufficient, under the rule in **Fidelity-Phila. Trust Co. v. Rothensies** (1945), 324 U.S. 108, to make the trust taxable. It said "Should they have predeceased the settlor, the property would have re-

verted to her to be disposed of as she might by will elect" (R. 26) and "The possibility of the settlor exercising this power ceases only at her death" (R. 25).

We submit that this is inconsistent with the decision of the Second Circuit in **Commissioner v. Irving Trust Co.** (CCA 2—1945), 147 F. (2d) 946, in which the facts were that the grantor provided for a stated life income to W and the balance of income to himself for life with remainders to his issue and in default of issue to his next of kin under the intestate laws. *The deed also gave the trustee absolute discretion to pay over principal to settlor during his lifetime.* The Circuit Court of Appeals for the Second Circuit held that the trust was not taxable under Section 302(c) of the Act of 1926 as construed by this Court in the **Stinson Estate** case. Judge Augustus Hand did point to the power of appointment in that case as a distinguishing feature. But surely there is no controlling significance in directing payment of corpus "as I may by will appoint" instead of directing payment to "my estate", "my administrator" or "my next of kin" or actually receiving it in the trustee's discretion. The lack of words constituting a power of appointment over an undivested remainder (and the remainder in the **Stinson** case was undivested) would not suffice to free it from taxation: **Bryant v. Helvering** (1940), 309 U.S. 106, 60 S. Ct. 444. By the same token, the presence of a nugatory power of appointment should not make taxable a remainder which the settlor has conveyed to living people.

If in the case at bar it be said that until Mrs. Taylor's death it was impossible to determine whether all her children and grandchildren would die first and bring the remainder back to go under her will, it must also be said that until the settlor's death in the **Irving Trust Co.** case it was impossible to determine whether the trustee would exercise his discretion and pay some or all of the corpus to the settlor

himself and also impossible to determine whether he would die leaving surviving issue.

We submit that these two cases, both decided after the decision of this Court in the **Stinson Estate** case, but before this Court explained that decision in the **Goldstone** case, are inconsistent. If one of these trusts is taxable and the other is not, we have a situation where corpus which might have been paid by the trustee to the settlor, or to his next of kin, is tax free and corpus which might have been paid to settlor's legatee is taxable. This seems to be a resurrection of the "elusive and subtle casuistries" which Mr. Justice Frankfurter sought to bury in **Helvering v. Hallock.** We submit that these decisions of the Second and Third Circuits are in substantial conflict and that the decision in the case at bar should, therefore, be reviewed and reversed.

Recent decisions in the Tax Court are also in conflict with the present case. In **Estate of Harris Fahnestock v. Commissioner** (1945), 4 T.C. — (No. 129), the trust provided for income to A for life with remainder to his issue, in default of issue to A's named sisters and their issue, and in default thereof "the entire principal of the trust shall revert to the Grantor or to his legal representatives". In other deeds of trust the same grantor provided that upon default of the named remaindermen "then to the Grantor; or if the Grantor be deceased to the personal representatives of the Grantor, to be by them distributed to the next of kin of the Grantor".

The Tax Court held the trusts were not taxable under Section 302(c) and reversed the Commissioner's ruling to the contrary. The **Stinson** case was distinguished as "a survivorship case".

The Tax Court decided the **Fahnestock** case on April 3, 1945, and followed it on April 16, 1945, in **Mary B. Hunnewell Est. v. Commissioner** (1945), 4 T.C. — (No. 132).

VI. CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the error of the Circuit Court of Appeals may be corrected and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Third Circuit, and finally reverse it.

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